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No. 07-581

IN THE
Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,

Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page ii of Petitioners' Opening Brief, and there are no amendments to that Statement.

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Despite the Employees' and their amici's efforts to redefine this case on appeal, the sole issue for this Court is whether the Second Circuit erred in holding that collectively-bargained agreements to arbitrate ADEA claims, no matter how clear and unmistakable, are unenforceable. There is no serious dispute that the methods by which such claims are resolved fall within the core authority of the Union, under Section 9(a) of the NLRA, to bargain over terms and conditions of employment. The only question is whether Congress ever enacted an exemption from that authority for claims that arise under the ADEA.

The answer to that question is no. The Employees, on whom the legal burden rests, fail to provide any evidence whatsoever of a legislative carve-out for ADEA claims. The provisions they cite – Section 626 of the ADEA and Section 118 of the Civil Rights Act of 1991 – do not address collectively-bargained forum selection clauses, must less condemn them. If anything, the plain text of Section 118 endorses arbitration. The Employees also fail to blunt the force of *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991), which rejected the idea that arbitration was incompatible with the ADEA's purposes, dismissed all contention that Congress had intended to make non-waivable the right to a judicial forum under the ADEA, and reaffirmed the general rule that arbitration should be viewed as not entailing any waiver of substantive rights.

Alexander v. Gardner-Denver, 415 U.S. 36 (1974), is also of no help to the Employees' position. The case is simply not on point. It concerned a situation in which

the employee was not able to raise, and the arbitrator lacked authority to consider, statutory claims at an arbitration proceeding, and then sought to bring them in court. Later cases expressly described it as a decision about collateral estoppel and preclusion. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 76 (1998); *Gilmer*, 500 U.S. at 35. Here, by contrast, the issue is whether an agreement is enforceable that expressly submits all statutory as well as contractual claims to arbitration. *Gardner-Denver* did not speak to that question. Broader language in the decision cited by the Employees constitute dicta that largely reflected the disrepute in which arbitration was held at the time.

Unable to justify the Second Circuit's per se rule against collectively bargained arbitration of statutory claims, the Employees and their amici seek to change the Question Presented – and even the facts. They claim now that they were denied any opportunity to present their ADEA claims before an arbitrator. The irony of their position, of course, is that they have resisted all efforts to compel them to arbitrate. In reality, the record shows that after the Union withdrew their ADEA claims (even while continuing to prosecute their contractual claims), it ceded to them full, untrammeled access to the arbitral forum. The Union confirmed the availability of the original forum. Pet. App. 42a. The Employees' own counsel acknowledged that he had received "repeated requests" for arbitration "under the Union's collective bargaining agreement." JA 76. The Employees, however, refused to return to arbitration, opting instead to file this action in federal court.

The Employees also rely on a fanciful bargaining history offered by Local 32BJ – completely outside the record – supposedly showing that the parties to the CBA did not intend to require the Employees to arbitrate individually. The Court should dismiss this eleventh-hour "evidence" out of hand. There was no presentation of these materials to any lower court and no opportunity to contest their accuracy, which is greatly lacking. The argument is not even plausible on its face; the Employees cannot explain why the employers would bother negotiating an agreement requiring arbitration of "all claims" as the "sole and exclusive remedy" – including specifically statutory ADEA claims – while exempting employees from the same obligation to arbitrate.

Following its customary practice to "deal with the case as it came here and affirm or reverse based on the ground relied upon below," *Peralta v. Heights Med. Center, Inc.*, 485 U.S. 80, 86 (1988); *see also Bragdon v. Abbott*, 524 U.S. 624, 637 (1998), this Court should reject the Employees' attempt to change the issue presented here. Rather, based on the record facts and applicable law, arbitration should be compelled because there is a clear and unmistakable waiver of the judicial forum, and the Employees have access to the arbitral forum to pursue their ADEA claims, in full accord with the safeguards outlined in this Court's *Gilmer* decision.

ARGUMENT

I. *GARDNER-DENVER* DID NOT HOLD THAT UNIONS ARE UNABLE TO BARGAIN ABOUT THE FORUM FOR RESOLVING THEIR MEMBERS' ADEA CLAIMS.

The Employees and their amici argue that *Gardner-Denver* held that unions cannot bargain over the type of forum in which their members' statutory discrimination claims will be resolved. Ignoring *Wright*'s express reservation of the question, 525 U.S. at 77, they maintain that this Court already settled the blanket unenforceability of such agreements more than thirty years ago. Beyond its surface implausibility, their position misreads *Gardner-Denver*, ignores its facts and limited holding, and focuses instead on dicta that were largely abandoned in later decisions.

A reading of *Gardner-Denver* as imposing an inviolate rule about the permissible scope of a forum selection clause contained in a collective-bargaining agreement goes well beyond the facts of that case and finds no support in its rationale. *Gardner-Denver* involved a then-conventional labor contract arbitration where the arbitrator was confined exclusively to issues arising under the contract and had no authority to venture beyond to consider external law. *See, e.g.*, *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 568 (1960). The decision did not analyze the powers of a union under the NLRA or even discuss Section 9(a), the provision that defines the ambit of a union's representative capacity. Any language about the extent of a union's authority to bargain over employees'

statutory claims would have been the purest dicta, for the collective-bargaining agreement there did not mention or reach statutory claims; they were not submitted for arbitration; and the arbitrator had no power to decide them. 415 U.S. at 38-43, 53. There was no occasion for the Court to decide the scope of the union's power in a case where the union had not exercised it, and "no holding can be broader than the facts before the court." *United States v. Stanley*, 483 U.S. 669, 680 (1987).

Rather, *Gardner-Denver* established a simple rule of non-preclusion for its factual scenario: the mere submission of contractual grievances to arbitration does not preclude adjudication of statutory claims, where the two are of a "distinctly separate nature," 415 U.S. at 50, and the arbitration process does not encompass the statutory claims. When a collective-bargaining agreement does not even provide for arbitration of statutory claims, then whatever arbitration occurs does "not . . . preclude subsequent statutory actions." *Gilmer*, 500 U.S. at 35. The Court even expressed its holding that way, stating that "an arbitrator's resolution of a contractual claim is [not] dispositive of a statutory claim under Title VII." 415 U.S. at 47. *Gardner-Denver* does not control here, where the Union clearly agreed on behalf of its members that their statutory discrimination claims would be arbitrated.

Contrary to the Solicitor General's position, it is this Court, not Petitioners, that has consistently explained *Gardner-Denver* as establishing a rule about preclusion rather than union authority. U.S. Br. 14. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728

(1981), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984) – cases on which the Employees heavily rely – the Court held that where the relevant collectively-bargained agreements did not encompass statutory claims, arbitral decisions did not carry "res judicata or collateral-estoppel effect" to bar a federal court action. *McDonald*, 466 U.S. at 307-08; *see also Barrentine*, 450 U.S. at 745. In *Gilmer*, the Court made the point even more explicitly, noting that *Barrentine* and *McDonald* "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims," but rather "the quite different issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *Gilmer*, 500 U.S. at 35. The Court has never retreated from that understanding of *Gardner-Denver*'s holding.

The Employees' main argument for their strained interpretation of *Gardner-Denver* centers around a footnote, 415 U.S. at 58 n.19, quoted in later decisions, in which the Court expressed a "concern" that where the union controls the presentation of an individual grievance, the interests of the individual member "may" be subordinated to the interests of other employees, and the union will not faithfully represent the member. Resp. Br. 15, 18; U.S. Br. 13-14. The possibility of such a conflict might distinguish the collective bargaining setting from one in which the individual agrees to arbitrate his own claims. *See Gilmer*, 500 U.S. at 35. But that point plainly was not the basis of the holding in *Gardner-Denver*, where statutory claims were not even (and could not have been) presented to arbitration and

there was no clear and unmistakable agreement to do so, as contemplated in *Wright*.

Nor does that concern justify a blanket rule, like the one applied by the Second Circuit, forbidding the Union from ever agreeing to an arbitral forum for hearing its members' ADEA claims. In the overwhelming majority of instances where a collective-bargaining agreement provides for arbitration of statutory claims, the union diligently pursues the employee's grievances, and even the major labor organizations agree that in such circumstances arbitral promises should be enforceable. *See* AFL-CIO/Change to Win ("CTW") Br. 8-9; 32BJ Br. 13, 18-19. Even if there is a possibility in some situations that a union might not fulfill its obligations, the mere "risk" of such an outcome "is too speculative to justify the invalidation of an arbitration agreement." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). And remedies exist to redress any egregious cases. *See* Pet. Br. 42-43.

Every employee must be guaranteed an arbitral forum in which his claims may be heard. But here, the Employees and their counsel unquestionably had such a forum – indeed, the very *same* forum, against the *same* opponent, before the *same* arbitrator, with the *same* authority to apply "appropriate law," Pet. App. 48a, and "grant any remedy required to correct a violation," *id.* at 45a, to which they had initially submitted their ADEA claims. Once the Union decided it would no longer advance the Employees' ADEA claims, it ceded the forum to them so that they could pursue those claims with their private counsel. *Id.* at 42a. The Employees

would have had complete and unfettered control over the presentation of their claims in that forum had they gone forward with the arbitration available to them.[1]

In response to these undisputed facts, the Employees weakly assert that the hearing might have been unfair, because Arbitrator Pfeffer might have been biased, Resp. Br. 26, or because arbitrators "generally are ill-equipped" to resolve discrimination claims since they "frequently come from the industry" and are "often not law-trained." *Id.* at 25-26. Of course, the Employees precluded any real testing of the fairness of the arbitration by bypassing that forum in favor of going to

[1] Contrary to the Solicitor General's rhetoric that this was an "extra-contractual, *ad hoc*, and post-dispute arbitral arrangement manufactured between the employer and the Union," U.S. Br. 20, and similar statements in the Employees' and Local 32BJ's briefs, the record evidence demonstrates otherwise. The Employees' counsel acknowledged in his District Court affidavit that he had received "repeated requests" for arbitration "*under the Union's collective bargaining agreement.*" JA 76 (emphasis added). The Union ceded the original contractual forum to the Employees, and the affidavit from the Union's counsel confirmed its availability, rather than created an entirely new forum. Pet. App. 41a. Nothing in the CBA foreclosed the Union from deferring to the Employees – who were equally bound by the promise to arbitrate, *see* Point III *infra* – the responsibility to prosecute their own claims. *See, e.g., Hill v. Washington Metro. Area Transit Auth.*, 309 F. Supp. 2d 63, 67 (D.D.C. 2004) (noting that "individual employees often have access to arbitration in grievance processes pursuant to collective bargaining agreements"). In any event, whether as a contractual matter such a procedure was allowed under the CBA is in the first instance for the arbitrator to decide. *See* pages 22-23 *infra*.

court. Moreover, OCA arbitrators include lawyers who are knowledgeable about employment discrimination law. Pet. Br. 7; JA 68-69.[2] Arbitrator Pfeffer, for example, is an experienced employment lawyer, formerly a partner at a union-side law firm, who is a full-time grievance arbitrator. Pet. Br. 9 n.4; JA 68-69. *Green Tree* also rejected speculative concerns about arbitral impartiality as a ground for declining to compel arbitration. *See* 531 U.S. 79, 89-90 (2000). All of these are merely the kinds of generalized attacks on the adequacy or fairness of arbitration that this Court has repeatedly rejected as being "'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477 (1989)). Such claims are "best left for resolution in specific cases" where they actually apply. *Id.* at 33.

The Solicitor General repeatedly describes the *Gardner-Denver* footnote as expressing a "conflict-of-interest" rationale, according to which the union has an "inherent conflict" with the individual member whose claim it would arbitrate, making every agreement to arbitrate negotiated by a union invalid. U.S. Br. 7, 8, 13, 16 (citing *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974)); *see also* Resp. Br. 15. But the argument is specious. "Self-interest" arises when the union seeks to

[2] The Employees cite a study showing that in 2000, 39% of labor arbitrators did not have law degrees. Resp. Br. 26 n.8. That means 61% of labor arbitrators *did* have law degrees. Obviously, such statistics do not show that all arbitrators are unqualified to hear discrimination claims.

protect itself or advance its own ends to the detriment of its members. In *Magnavox*, for example, the union sought to impair the employees' choice of their bargaining representative, thereby entrenching itself. 415 U.S. at 325. Here, by contrast, the Union had no self-interest at stake when it agreed that employees must submit their ADEA claims against their employers to the arbitral forum. Such a waiver neither helped nor hurt the Union, and therefore no "inherent" conflict existed.

It would be especially improper to read *Gardner-Denver* more broadly than its narrow holding because its dicta reflect antiquated views about arbitration that this Court long ago abandoned. The entire final section of the decision was devoted to explaining how arbitral processes are "comparatively inferior" to adjudication, 415 U.S. at 57, a position now repeatedly repudiated. And the broadest dicta cited by the Employees and their amici, stating that Title VII rights cannot form part of the collective-bargaining process, was explicitly premised on the Court's view (spelled out in the same paragraph of the decision) that Title VII rights to a judicial forum were not waivable. *Id.* at 51-52. That view relied solely on *Wilko v. Swan*, 346 U.S. 427 (1953), which was overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), and expressly rejected in *Gilmer*. In light of the "radical change, over two decades, in the Court's receptivity to arbitration," *Wright*, 525 U.S. at 77, reliance on bits of superseded dicta would be singularly inappropriate.

Gardner-Denver did not consider, much less decide, whether a union can agree to the arbitration of its members' ADEA claims. Principles of stare decisis are thus inapplicable here. Resp. Br. 19. A decision holding such forum selection clauses enforceable would be entirely consistent with the holdings of *Gardner-Denver* and its progeny.

II. A UNION HAS THE AUTHORITY TO AGREE TO THE ARBITRATION OF ITS MEMBERS' ADEA CLAIMS.

The authority granted to a union under Section 9(a) of the NLRA to bargain about the conditions of its members' employment is extremely broad, covering any topic that is "germane to the 'working environment.'" *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring)). The Employees argue that the choice of forum for statutory discrimination claims lies outside that power. But neither the NLRA nor the ADEA provides a basis to conclude that Congress excluded arbitration of statutory claims from the union's bargaining authority. As *Gilmer* held, the right to a judicial forum is exclusively a procedural right whose waiver does not diminish any substantive guarantee under the ADEA. And, as *Gilmer* taught, 500 U.S. at 26-27, in the absence of clear statutory disapproval of collectively-bargained arbitral agreements or an "inherent conflict" with the statutory purposes – neither of which the Employees have demonstrated – such an agreement is enforceable.

A. The NLRA Provides Broad Authority To Bargain Over Methods of Resolving Statutory Claims.

Neither the Employees nor their amici directly dispute that the arbitration of statutory discrimination claims falls within the broad ambit of "rates of pay, wages, hours of employment, or other conditions of employment" over which bargaining is required under the NLRA. 29 U.S.C. §§ 159(a), 158(a)(5), 158(d). This Court has recognized that both the method of resolving grievances arising out of the employment relationship, *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991); *see also United States Gypsum Co.*, 94 NLRB 112, 131 (1951), and the elimination of discrimination in the workplace, *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 69 (1975); *see also Star Tribune*, 295 NLRB 543, 548 (1989), are mandatory subjects of bargaining. It follows that the forum selected for the resolution of discrimination claims is similarly a proper subject of bargaining.[3]

The Employees contend, however, that while a union can waive "collective and economic rights," it lacks

[3] Even if the arbitration of statutory discrimination claims is not deemed to be a mandatory subject of bargaining, it is certainly a permissive one, and an employer and union may agree to such a provision, as they did here. "A matter that is not a mandatory subject of bargaining, unless it is illegal, may be raised at the bargaining table to be discussed in good faith, and the parties may incorporate it into an enforceable collective-bargaining agreement." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 n.13 (1981) (citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958)).

authority to waive "individual, non-economic rights," including those in the ADEA. Resp. Br. 21. This distinction misapprehends the law. A union's ability to waive statutory rights depends not on some imagined classification scheme, but simply on whether Congress intended the specific rights at issue to be non-waivable. For example, although wages relate to "collective, economic rights," and are by definition a mandatory subject of bargaining, Congress has removed the union's authority to waive the statutory minimum wage. *Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 602-03 (1944). Conversely, although the right of union officials not to be disciplined more severely than other employees for participation in an unlawful work stoppage is an "individual, non-economic" right, this Court has held that the union may "choose to bargain away this statutory protection to secure gains it considers of more value to its members." *Metropolitan Edison v. NLRB*, 460 U.S. 693, 707 (1983).

It is the Employees and the Solicitor General, not Petitioners, who have a "mistaken understanding" of *Metropolitan Edison*. U.S. Br. 17; *see also* Resp. Br. 22 n.7. The Court's principal rationale for allowing waiver by the union in that case was not that the right was economic in nature, but rather that the NLRA specifically contemplates such waivers. 460 U.S. at 706 n.11. Similarly, the Court in *Metropolitan Edison* distinguished *Gardner-Denver not* because it "involve[d] a statute other than the NLRA that protects an individual right," U.S. Br. 17, but because "waiver would be inconsistent with the purposes of the statute at issue there" (an observation nullified by *Gilmer*). 460 U.S. at 706 n.11; *see also Magnavox*, 415 U.S. at 328-29 (Stewart,

J. concurring) ("[T]he Board and the courts should not relieve the parties of the promises they have made unless a contractual provision violates a specific section of the [NLRA] or a clear underlying policy of federal labor law.") The touchstone of the analysis is always Congressional intent.[4]

Moreover, the Employees' position ignores the fundamental distinction between *substantive* statutory rights and *procedural* ones under the ADEA. Substantive ADEA rights cannot be waived by anyone, whether union or employee. However, procedural rights – such as the right to a judicial forum – may be waived, consistent with Congressional intent. *Gilmer* held that waivers of a judicial forum are enforceable precisely because the employee does not forgo any entitlement to substantive relief. 500 U.S. at 26-27; *accord Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Arbitral forums are equally competent as judicial ones to render fair, impartial decisions consistent with applicable law and to deliver equivalent remedies.[5] *Id.* Thus, cases like *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), Resp. Br. 23, are beside the

[4] Neither Employees nor their amici address *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 826-30 (3d Cir. 1991) (en banc) (Alito, J.), which expressly rejected the argument that *Gardner-Denver*, *Barrentine*, and *McDonald* precluded a public sector union from consenting, on behalf of its members, to future drug testing, notwithstanding their Fourth Amendment rights. *See* Pet. Br. 24.

[5] Indeed, the CBA here specifically provided that the Office of Contract Arbitrator would apply the same law and have available the same remedies as would exist in a court action. Pet. Br. 5-6; Pet. App. 43a, 48a.

point, because arbitration does not involve the loss of any "minimum substantive guarantees." *Id.* at 565 (internal quotation and citation omitted).

It is entirely consistent with a union's traditional, statutory function for it to bargain over the forum used to hear the ADEA claims of its members. Employees have much to gain from a more streamlined and efficient system of dispute resolution, especially one bargained for by the union, and have no remedies or outcomes to lose. Pet. Br. 26-30; *see also Circuit City*, 532 U.S. at 122-23. Nothing in the NLRA precludes such bargaining or prevents enforcing such agreements.[6]

[6] The Employees acknowledge that affirmance of the Second Circuit's rule would mean that an employer would be free to bypass the Union and enter into arbitration agreements directly with individual employees per *Gilmer*, but fail to explain how Congress could have intended such an anomalous result, or to provide any evidence that Congress did. *See* Resp. Br. 21 n.6 (citing *Airline Pilots Ass'n Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999), *adopted as opinion of en banc court*, 211 F.3d 1312 (2000)). The AFL-CIO and Change to Win suggest that even though employers would be able to enter into agreements directly with employees for arbitration of statutory claims, they would nonetheless have to bargain with the union over making such agreements a condition of employment. AFL-CIO/CTW Br. 17. But this "solution" to the *ALPA* problem would give unions and employers the same ability to enter into agreements requiring arbitration of statutory claims that the court below said were not enforceable. The Solicitor General tries to avoid the holding of *ALPA* by suggesting that it is unnecessary to decide what level of union participation, if any, would be required for an employer to

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B. Congress Did Not Preclude Collectively-Bargained Waivers of a Judicial Forum For ADEA Claims.

Under settled FAA jurisprudence and the longstanding national policy favoring labor arbitration, once the Union exercised its collective-bargaining authority to agree to arbitration, the burden is on the Employees to show that Congress did not intend unions to have the power of forum selection with respect to a subset of workplace claims. Especially in light of the fact that arbitration does not diminish substantive rights, the Employees can escape the arbitral promise made on their behalf only if Congress has "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," which would be discernible from the text, legislative history, or statutory purposes of the ADEA. *Gilmer*, 500 U.S. at 26-27. Neither the Employees nor their amici make any such showing.

The Employees and their amici attempt without success to supply evidence of such legislative intent from 29 U.S.C. § 626(f) and Section 118 of the 1991 Civil Rights Act. Pub. L. 102-166, 105 Stat. 1071. First, the Employees argue that Section 626 of the ADEA requires waivers of a judicial forum to be made by the affected individual himself. Resp. Br. 3, 13. That is flatly wrong.

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implement a *Gilmer*-like arrangement with its union-represented employees. U.S. Br. 30-31 n.12; *see also* NAA Br. 26 n.8. But if a union and employer can agree to a *Gilmer*-type system as a condition of employment, there is no logical basis for arguing that a union lacks authority to agree directly to an arbitral forum.

Every court of appeals to address the issue has held that Section 626 applies only to the waiver of substantive ADEA rights, not forum selection clauses. *See, e.g.*, *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1, 12-13 (1st Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 181-82 (3d Cir. 1998); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660-61 (5th Cir. 1995). *Gilmer* itself refutes the argument, for if waivers of procedural rights could not be signed before the claims arose, on the Employees' interpretation of 29 U.S.C. § 626(f)(1)(C), then even individual pre-dispute agreements to arbitrate would never be enforceable. In fact, *Gilmer* considered Section 626 and found that Congress did not preclude arbitration "even in its recent amendments to the ADEA." 500 U.S. at 29 & n.3.

Section 118 of the Civil Rights Act of 1991 is similarly unavailing. The Employees rely on snippets of legislative history that purportedly show that Congress precluded any waiver of the right to a judicial forum. Resp. Br. 32. But nothing in the provision itself supports that view, and an unambiguous text does not permit resort to legislative history at all, much less inconsistent legislative history, as here. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989); *Rosenberg*, 170 F.3d at 11. Every court of appeals considering the issue has rejected the contention that Congress sought in Section 118 to preclude arbitration. *See, e.g.*, *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 752-53 (9th Cir. 2003) (en banc) (noting that "it would be ironic to interpret statutory language encouraging the use of arbitration and containing no prohibitory language as evincing Congress' intent to preclude arbitration of Title VII claims"); *Rosenberg*, *supra*;

Seus, 146 F.3d at 182-83 n.1 (rejecting reliance on the House Report language cited by the Employees and the Solicitor General here in view of "ample legislative history to support a straightforward reading of the text of § 118"); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 205-06 (2d Cir. 1999); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881-82 (4th Cir. 1996).

Given the absence of a negative Congressional intent in the statutes, it comes as no surprise that this Court's cases do not preclude collectively bargained arbitral promises. Neither *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), nor *Connecticut v. Teal*, 457 U.S. 440 (1982), Resp. Br. 33, remotely involved questions of union representation. In both cases, practices were found to violate Title VII's substantive guarantees, not to bar procedural devices such as forum selection clauses. Nor does the fact that the ADEA furthers important social policies, Resp. Br. 34-35, have any bearing on whether a union has the power to select the forum for ADEA claims. *Gilmer* rejected that very argument, holding that there is no "inherent inconsistency" between such social policies and the enforcement of agreements to arbitrate. 500 U.S. at 27. Indeed, the Court commented that arbitration may actually *further* those policies. *Id.* at 28.

In short, the Employees have completely failed to meet their burden of showing that Congress intended to preclude enforcement of collectively-bargained agreements for arbitration of ADEA claims, at the same time that it permitted, and indeed encouraged, arbitration generally, including as to ADEA claims.

C. The Union Here Agreed To A Dispute Resolution Process, To Which The Employees Consented.

The same result is reached if the collectively-bargained agreement for arbitration of statutory discrimination claims is seen not as a waiver of procedural rights but simply as a dispute resolution process jointly adopted by an employer and union. Under this view, the contractual provision for arbitration of discrimination claims is no different from a *Gilmer*-approved provision adopted unilaterally by an employer as a condition of employment, except that the employees have a significant say – through their bargaining agent – in determining whether arbitration will be required and designing the applicable procedures. Lower courts have generally held that non-union employees can demonstrate their consent to a company's arbitration policy, under *Gilmer*, by accepting or continuing work subject to that policy.[7] Individual union members, often (as here) accorded the right to vote on the terms of a collective bargaining agreement, may reject or consent to forum selection clauses in much the same way.

[7] *See, e.g., Tinder v. Pinkerton Sec.*, 305 F.3d 728 (7th Cir. 2002); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); *Seawright v. Am. Gen. Fin. Servs. Inc.*, 507 F.3d 967 (6th Cir. 2007) (holding that an employee's continuation of employment after the effective date of the arbitration program constituted a knowing and voluntary acceptance of a contract to arbitrate, even where employee did not actually sign a waiver); *Armstrong v. Assoc. Int'l Holdings*, 242 F. App'x 955 (5th Cir. 2007); *Brennan v. Cigna Corp.*, Nos. 06-5027 & 06-5124, 2008 U.S. App. LEXIS 13045 (3d Cir. June 18, 2008); *but see Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007).

Contrary to the position taken by amicus National Academy of Arbitrators, Professor Theodore St. Antoine, a close student of the issue over many years and past President of the Academy, has noted that arbitral clauses in collective bargaining agreements are no less "'knowing' and 'voluntary' than what occurs when an employer presents a new or incumbent individual worker, like Robert Gilmer, with a mandatory arbitration agreement on a take-it-or-leave-it basis." Theodore J. St. Antoine, *Gilmer In The Collective Bargaining Context*, 16 Ohio St. J. on Disp. Resol. 491, 503-04 (2001) (footnotes and citations omitted). In an article written while this case was pending, Professor St. Antoine reviewed recent empirical studies of both unionized and non-unionized employees, and concluded that employees do considerably better in arbitration than litigation, and that "[e]mployees, particularly those at the lower end of the pay scale, will find readier access to effective relief in arbitration" than litigation. Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 796 (2008).

The AFL-CIO and Change To Win also suggest that an employee can effectively consent to substitute arbitration for litigation, consistent with *Gilmer*, by requesting arbitration of his statutory discrimination claim through the collectively-bargained grievance procedure. AFL-CIO/CTW Br. 16. Of course, that is precisely what the Employees, with their private counsel, did here in submitting their ADEA claims to the contractual grievance procedure. *See* JA 31, 95. Their consent to the process is no less effective merely because, after the Union decided not to prosecute those

claims, they chose to commence this action in federal court in lieu of proceeding in arbitration on their own with private counsel. *See, e.g.*, *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994) ("Once a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority.").

III. THE EMPLOYEES ARE BOUND BY THE AGREEMENT TO ARBITRATE CONTAINED IN THE CBA.

In addition to arguing that collectively-bargained promises to arbitrate are categorically unenforceable, the Employees and their amici assert that as a matter of contract interpretation, the arbitration provision in the CBA simply does not apply to them. Resp. Br. 2, 41-47. Relying on Local 32BJ's one-sided, extra-record account of the "bargaining history," 32BJ Br. 4-14, they insist that the arbitral promise does not cover either individual employees or their claims, and that the Union can unilaterally choose between arbitrating those claims or leaving them to be litigated in court. This contrived argument was not raised in either of the courts below, flies in the face of the express premises of both the District Court's and Second Circuit's decisions, ignores New York State cases interpreting the arbitration clause, and is a matter for the arbitrator to decide, not the courts. It is also wrong.

To begin with, this contractual argument was not raised below. Both the District Court and the Second Circuit accepted that the arbitration clause clearly and unmistakably sought to waive the Employees' right to

a federal forum, holding that the agreement was unenforceable – a ruling that would have been unnecessary if in fact the clause did not even purport to bind the Employees. *See* Pet. App. 21a; Pet. App. 8a-11a. The Employees' only ground for defending the denial of the motion to compel, before the District Court and the Second Circuit, was that collectively-bargained arbitration agreements are never enforceable as a matter of law. Indeed, they disavowed the very argument advanced here, by expressly conceding that "the waiver is sufficiently explicit." Br. for Plaintiffs-Appellees in Second Circuit at 9. Having done so, they should not be permitted to advance the opposite argument now. *See, e.g., Rita v. United States*, 127 S. Ct. 2456, 2470 (2007) (issues not raised below will not be considered by the Court); *Heckler v. Campbell*, 461 U.S. 458, 468-69 & n.12 (1983) (arguments for affirmance not raised below will be considered "only in exceptional cases") (internal quotation and citation omitted).

Furthermore, to the extent the Employees now seek to reinterpret the meaning of the CBA, the arbitral agreement here provides that it is a matter for the arbitrator to decide, not the courts – and certainly not this Court in the first instance. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-45 (1995) ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . , so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter."); *AT&T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649-50 (1986) (same). In this case, the CBA itself provides that the arbitrator shall decide "*all* differences arising between

the parties *as to interpretation, application or performance* of any part of this Agreement *and such other issues as the parties are expressly required to arbitrate before him under the terms of this Agreement*." Pet. App. 43a (emphasis added). Under that broad clause, the question the Employees now raise – whether the provision that arbitration would be the "sole and exclusive remedy" for workplace discrimination claims was individually binding on them – was for the arbitrator alone.

Even if this Court considers the contractual argument asserted by the Employees and their amici, the interpretation they advance is simply wrong. It is crystal-clear that the CBA intends to bind individual employees to arbitrate all their grievances. The Agreement specifies at its outset that it is made between the RAB "and the Union, on behalf of its members." Joint App. in Second Circuit at A160. Article I provides that "[t]he Union obligates itself and its members that they will in good faith comply with all of the provisions." JA 48. The agreement expressly protects "any present or future employee" from violation of specified statutory anti-discrimination provisions, and provides that "[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." Pet. App. 48a. "All such claims" clearly and unmistakably includes and refers to individual employee claims under the ADEA. Ignoring those terms is contrary to the basic rule of contract construction that courts must avoid interpretations that would leave contractual clauses meaningless.

Restatement (Second) of Contracts § 203(a) (1981); *Ladd v. Ladd*, 49 U.S. 10, 28 (1850).[8]

Nor does the "bargaining history" offered up by Local 32BJ, which was neither a party nor an amicus below – and on which the Employees, the Solicitor General, and other amici all leap to rely – demonstrate that the arbitral promise here means anything different from what it says. This offered "history" is neither in the record nor accurate. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) (refusing to consider materials that were not part of the record evidence). Local 32BJ's own submission confirms that the no-discrimination clause was amended

[8] While Petitioners had no occasion to address this issue below, there is far more in the bargaining history and past practice to support their reading of the CBA than the few contractual phrases on which Local 32BJ relies. An arbitrator considering a contention by the Employees that the CBA does not require them to arbitrate statutory discrimination claims, notwithstanding the "no-discrimination" clause and their express concession on appeal that the arbitral promise was "sufficiently explicit," would consider that full bargaining history and past practice. *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives' Assoc.*, 491 U.S. 299, 311 (1989) ("[T]he parties' 'practice, usage and custom' is of significance in interpreting their agreement.") (citation omitted); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("[A] collective bargaining agreement is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."); Robert A. Gorman & Matthew W. Finkin, *Basic Text On Labor Law: Unionization And Collective Bargaining* 733 (2d ed. 2004).

in 1999 to make the clause enforceable after *Wright*, *see* 32BJ Br. 13, and the contemporaneous side letter signed by Local 32BJ's chief negotiator stated that although he was personally uncomfortable with limiting a worker's ability to pursue a statutory claim of discrimination to only the arbitral forum, he had agreed to maintain the provision in the CBA. Pet. App. 3a-4a. There is no way to understand those facts other than as reflecting the clear and unmistakable agreement that employees' ADEA claims would be resolved in an arbitral forum, not a judicial one.[9]

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[9] Further undermining the Employees' version of the bargaining history, New York State courts and administrative agencies have been enforcing the clause since 2000, compelling Union members to arbitrate their discrimination claims. *See, e.g.*, *Lewandoski v. Collins Bldg. Servs.*, No. 104657/00 (Sup. Ct. N.Y. Co. Dec. 6, 2000); *Garcia v. Bellmarc Prop. Mgmt.*, 295 A.D.2d 233 (1st Dep't 2002); *Roman v. Cushman & Wakefield, Inc.*, *Compl. No. M-E-LR-02-1013054-E (*City of N.Y., Comm'n on Human Rights Feb. 14, 2003); *Cocco v. Tudor Realty Servs. Corp.*, Compl. No. M-E-T-04-1015487 (City of N.Y., Comm'n on Human Rights Feb. 27, 2004); *Melesse v. Brown Harris Stevens Residential Mgmt. LLC*, No. 101052/06 (Sup. Ct. N.Y. Co. Nov. 21, 2006); *Sum v. Tishman Speyer Props., Inc.*, 37 A.D. 3d 284, 284 (1st Dep't) ("This union-negotiated waiver of plaintiff's right to a judicial forum to pursue the statutory claims here at issue is 'clear and unmistakable,' and enforceable."), *appeal granted*, 9 N.Y.3d 817 (2007); *McClellan v. Majestic Tenants Corp.*, No. 302489/07, 2008 N.Y. Misc. LEXIS 3850, at *3 (Sup. Ct. Bronx Co. June 27, 2008) ("sole and exclusive" provision is clear, unmistakable, and enforceable); *Odeh v. Brown Harris Stevens Residential Mgmt.*, No. 0119173/06, 2008 WL 169678 (Sup. Ct. N.Y. Co. 2008). Despite the consistent contractual interpretation of these decisions, Local 32BJ never sought to alter the "sole and exclusive" language in any of its *nine negotiations* for successor collective bargaining agreements with the RAB that have taken place since 2000.

On the Employees' reading, no discrimination claims of any Union members would ever need to be arbitrated, and the Union could avoid arbitration of all such claims simply by deciding not to take any of them to arbitration. That construction turns the penultimate sentence of the "no discrimination" clause into a nullity, and is an unsustainable reading of a provision promising the employers that "all such claims" would be subject to arbitration as the "sole and exclusive remedy." Pet. App. 48a. A far more natural, plausible, and sensible reading would understand that provision as giving the Union the right to assert such claims if it chooses to do so, and the Employees the obligation to arbitrate before the contractually-specified Contract Arbitrator, with their own counsel, if the Union chooses not to assert the claim on their behalf. That is the reading the employer and the RAB (who negotiated the clause) have long had, as is demonstrated by state court decisions enforcing the arbitration clause, *see* note 9, *supra*, and confirmed by the telling admission of the Employees' counsel that he had received "repeated requests" for "arbitration *under the Union's collective bargaining agreement*." JA 76 (emphasis added); *see also* JA 46 and Pet. Br. 8 n.3 (request to plaintiffs' counsel to participate in the then-pending initial arbitration).

Equally baseless is the Employees' claim that *Wright* requires not only a "clear and unmistakable" promise to arbitrate discrimination claims but also individual sign-off by the claimant. Resp. Br. 44-46. There is no support in this Court's precedents or the statutes for such a position, and Section 3 of the FAA requires a dispute "referable to arbitration under an

agreement in writing for such arbitration," without more. From *Metropolitan Edison* forward, the Court has taught that union waivers of individual rights or a federal judicial tribunal must be clear and unmistakable, but not that the individuals subject to the waivers themselves must sign individual "clear and unmistakable" waivers. *See, e.g.*, *Wright*, 525 U.S. at 79 ("[W]e think any *CBA requirement* to arbitrate . . . must be particularly clear.") (emphasis added); *Metropolitan Edison*, 460 U.S. at 710 ("*[A] union may waive this protection* by clearly imposing contractual duties on its officials . . . .") (emphasis added).[10]

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[10] In any event, courts and arbitrators have broad powers to supply missing terms in arbitration agreements to effectuate the intent of the parties, pursuant to the express authority of the FAA, 9 U.S.C. §§ 4-5, and consistent with the FAA's strong policy favoring arbitration. *See, e.g.*, *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715 (7th Cir. 1987) (affirming decision to enforce arbitration where court decided who the arbitrators would be, where the arbitration would take place, and what procedures would govern); *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308 (11th Cir. 2005) (failure of mandatory arbitration clause to identify arbitrator, forum, location, or allocation of costs from arbitration did not render clause unenforceable since under 9 U.S.C. § 5 federal district court can supply such terms).

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed, and the case remanded for further proceedings in accordance with the Court's decision.

Respectfully submitted,

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